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How Chairman's Wheeler's Video-App Plan Promotes Competition and Protects Private Rights

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This probably doesn't come as a shock to you, but programmers, broadcasters, and big Hollywood studios can't ask cable companies to break the law, and vice versa.

Yet this fact has become controversial in recent days, as part of the all-fronts attempt by cable and Hollywood to derail or delay Federal Communications Commission Chairman Tom Wheeler's sensible plan to "unlock the box" and free people from having to rent set-top boxes to watch the programming they already pay for. (Remember, the FCC is required by Congress to promote competition in this area.)

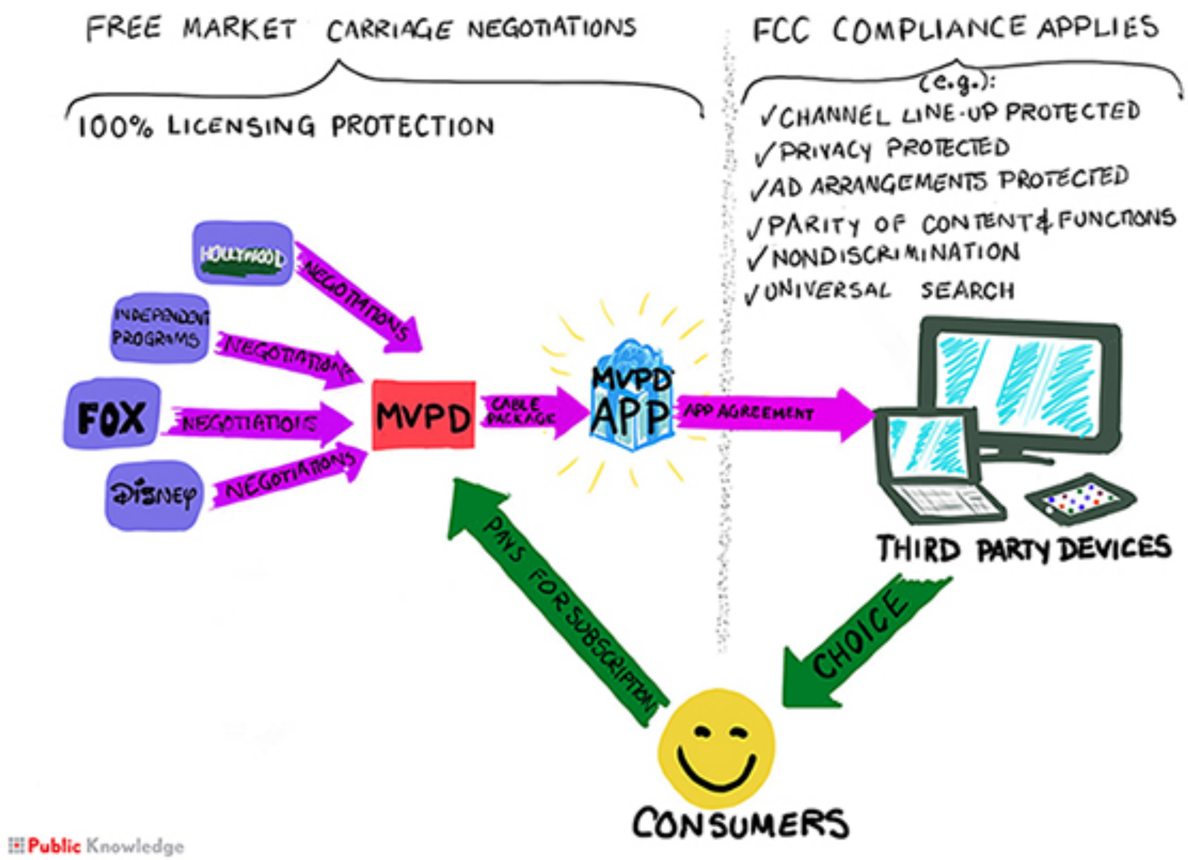
It's not like there aren't already "unlock the box" rules on the books. The established CableCARD rules have been around for a long time. They need to be updated for a number of reasons -- but one key component of them is that they are not optional. Cable operators are required to allow subscribers to watch their entire programming line-up on CableCARD devices like TiVos. (The only hiccups have been technical -- one reason CableCARD needs to be replaced.) This means in practice that a programmer can't ask a cable company to exclude its channels from CableCARD devices -- carriage on cable means carriage on competitive devices.

Naturally, this has to be part of any successor to CableCARD, as well, such as the Chairman's current apps-based approach to competition. The FCC can't carry out its Congressional mandate to promote "competitive navigation devices" unless there are ground rules to assure that competitive devices can access the same programming as rented boxes, and provide comparable features.

Yet the fact that cable programming must be available on apps on competitive devices, on nondiscriminatory terms, is being framed as some kind of FCC overreach, or a "compulsory license," or as interfering with contracts or copyright. But this is absurd -- especially considering that the apps-based approach is exactly what the cable and big content companies have been advocating for a while now. Neither copyright nor contract law work this way.

Let's work through some aspects of the Chairman's app proposal. Major pay-TV operators will provide apps to some devices.The apps will have the same programming and features as cable boxes themselves do. Like CableCARD, this will be a baseline requirement for pay-TV carriage. (Programmers, of course, remain free to distribute programming outside of traditional pay-TV channels.) Because the apps are developed by the pay-TV operators themselves, they will honor terms of programming contracts that relate to things like channel placement.

There will be some sort of agreement between pay-TV providers and device makers that controls the device's access to this app. This is more control for cable companies than they have now -- under the CableCARD rules, device makers just sign one agreement, with an industry consortium, not with each pay-TV provider. This agreement can be used, among other things, to protect the security of programming, and to ensure that device manufacturers follow privacy and accessibility standards.



This agreement is not a content license. The only content licenses that are involved in this whole process are the existing carriage agreements between programmers and pay-TV providers. App agreements like the ones we're talking about here are not uncommon. They are usually called "licenses" -- so some confusion between this agreement and carriage agreements is understandable. But carriage agreements between pay-TV providers and programmers already exist, and take place in a free market environment -- subject to FCC rules and Congressionally-enacted statutes, of course.

Every developer who submits an app to an app store enters into such an app agreement. There are requirements on both sides, and ultimately, the app developer is granting permission (a license) to the app store to distribute its app.

Take the example of an online video service, like Netflix or Hulu. The service has licenses to the content that it carries, and it enters into a license for its app with various app stores. But an agreement between Netflix and Apple, for example, is not a "content license" or a "carriage agreement" -- even though it results in the programming Netflix has licensed being viewable on Apple devices.

There are even plenty of examples of programming being viewable on devices without any agreement at all. When you buy a TV set, neither you, nor the manufacturer of the TV needs to then go and hammer out an agreement with the major studios. A TV set merely displays programming -- the service that delivers that programming to the TV gets the license, not anyone else. TVs also let viewers access multiple different sources of programming all on one screen -- they can watch cable, or DVDs, or home videos, or online programming without disrupting any supposed contract rights, and modern smart TVs even let people access apps and other services. None of this has ever been considered to be a problem.

This is analogous to the pay-TV apps under the FCC's proposal -- the pay-TV providers will develop apps, and continue to negotiate the licenses they need to deliver programming in the marketplace. Viewers do their part by paying their cable bills, and the devices that viewers use should be their choice. Apart from true device choice, this is how the programming marketplace has always worked -- and it's an odd thing to challenge in the context of this specific FCC proposal.

The most controversial component of the current app proposal seems to be a well-founded desire of the FCC to avoid outcomes that would result in less consumer choice, or that would undermine the entire plan. Thus, as mentioned before, there have to be baseline requirements for apps, in terms of the programming they carry and the features they have. Beyond that, the app agreement itself cannot contain anticompetitive terms -- such as requiring that devices first disable access to online sources of programming before they can access the MVPD app, or holding device makers or programmers hostage to unrelated business demands of the pay-TV providers.

The FCC should do whatever it can to rule out certain kinds of anticompetitive behavior upfront, by setting out clear rules. But there also needs to be some kind of backstop, since it's hard to predict every kind of anticompetitive or discriminatory term that might work its way into the app agreement. But this backstop is not the same as the FCC writing or rewriting the device maker/pay-TV provider app agreement--and it certainly has nothing to do with pay-TV provider/programmer carriage agreements.

Some programmers seem well aware of how cable tricks can be used against them--they don't want pay-TV providers to require that some programmers get priority over others in search results, or to discriminate between programmers in how they're available via apps. (And even some pay-TV providers have complained, in other contexts, about the ways that large programmers or broadcasters put pressure on them.) So there is common ground about the need for some sort of competitive safeguard -- just not on the means to achieve it. But if we start from an understanding of what the FCC is proposing to do and why, and what the different licences and agreements in question actually are, it seems like there's a way to find common ground that will finally bring device competition to pay-TV subscribers. But if policymakers allow the difference between licenses and agreements to be muddied, we could be left another 20 years of delay, false starts, and consumer rip-offs.

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